STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On its Own Motions	)	
	)	09-0592
	)	
Adoption of 83 Ill. Adm. Code 412	)	
An Amendment of 83 Ill. Adm. Code 453	)	
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BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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STAFF BRIEF ON EXCEPTIONS

Pursuant to Section 200.830 of the Illinois Commerce Commission's ("Commission") Rules of Practice, 83 Ill. Adm. Code 200.830, Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned counsel, respectfully submits this Brief on Exceptions ("BOE") to the Administrative Law Judge's Corrected Proposed First Notice Order ("Proposed Order" or "PO") and Appendix A to the Proposed Order, which is the ALJ's proposed Part 412 (Proposed Rule), both of which were issued on March 18, 2011.

I. INTRODUCTION

Staff commends the Administrative Law Judge ("ALJ") for taking on the challenging task of sifting through the vast numbers of comments, proposed rule language and also for tackling the difficult subject matter this rulemaking presented.

Staff, nonetheless, has a number of exceptions to the Proposed Order. Staff also seeks clarification on certain issues while still advocating its position. Staff,

consequently, will label the clarifications "exceptions" in the event a party wishes to reply to Staff in its Reply Brief on Exceptions ("RBOE").

Staff also is providing the attached Staff recommended Proposed First Notice Order done in legislative style for the convenience of the Administrative Law Judge, which contains both Staff's proposed exceptions replacement language and some edits that are ministerial in nature in an endeavor to correct what appeared to Staff to be inadvertent typographical errors. (Staff BOE, Att. A.) Staff is also providing the attached Staff recommended Proposed First Notice Rule, again done in legislative style for the convenience of the ALJ. (Staff BOE, Att. B. for Part 412 and Att. C. for Part 453)

II. STAFF EXCEPTIONS

A. Section 412.10 Definitions

Staff Exception No. 1: "Complaint"

The Proposed Order accepts Staff's definition of "Complaint," stating: "The Commission finds the proposed definition for "Complaint" as recommended by Staff and the CUB/AG to be reasonable and adopts the language as revised." (Proposed Order at 2.) However, Appendix A of the Proposed Order uses the definition of Complaint as contained in Staff's Initial Draft Rule and the CUB/AG's Initial Comments. In its Reply Comments Staff revised the definition of "Complaint" based on comments received by ICEA by replacing "an entity" with "a RES" to clarify the complaint is an objection made to the RES. Staff also changed "another" to "other." These changes, though slight, were non-controversial and in Staff's opinion merit inclusion in the rule. Staff therefore recommends the definition of "Complaint" as proposed in its Reply Comments and Initial Brief as follows:

"Complaint" means an objection made to a RES ~~an entity~~, by a customer or ~~an~~other entity, as to its charges, facilities or service, the disposal of which complaint requires investigation or analysis.

Staff Exception No. 2: "Letter of Agency"

The Proposed Rule (Appendix. A) strikes Staff's proposed definition of "Letter of Agency." The Proposed Order states in the discussion of the definition of "Sales Contract:" "The Commission finds that the term "letter of agency" is a misnomer in this case, particularly given the lengthy discussion on the subject of rescission." (Proposed Order, at 7.) The Proposed Rule includes a new definition for "Written Authorization," which was not previously proposed by any parties in this proceeding.

"Written Authorization" means the document described in Section 2EE of the Consumer Fraud and Deceptive Business Practices Act [815 ILCS 505/2EE] and referenced in Section 16-115A of the Public Utilities Act.

The document described in Section 2EE of the Consumer Fraud Act is a "letter of agency." The sole purposed for the letter of agency as described in Section 2EE is to authorize an electric service provider change. The letter of agency as described in Section 2EE of the Consumer Fraud Act may include a written or **electronically** signed authorization. The letter of agency must be a separate document containing only the required authorization language described in 815 ILCS 505/2EE(a)(5), which includes, among other things, the terms, conditions and nature of the service to be provided including the rates for the service contracted. For these reasons, Staff's proposed definition of "Letter of Agency" should remain in Section 412.10 and the definition of "written authorization" included in the Proposed Rule should be removed.

"Letter of Agency" means the document described in Section 2EE of the Consumer Fraud and Deceptive Business Practices Act [815 ILCS 505/2EE] and referenced in Section 16-115A of the Public Utilities Act. Act [220 ILCS 5/16-115A].

Staff Exception No. 3: "Material Terms"

The Proposed Order accepts CUB/AG's proposed definition of "Material Terms". The CUB/AG proposed this definition in its Initial Comments on March 4, 2010. The term "material terms" only appeared in the CUB/AG's proposed new Section 412.160 Customer Authorization. The Proposed Rule, however, did not include the CUB/AG's Proposed Section Customer Authorization. The Proposed Order concluded that: "The Commission finds CUB/AG's proposed section is unnecessary and redundant and it will not be adopted." (Proposed Order, at 21) Because the term "Material Terms" does not appear anywhere in the Proposed Rule, there is no need to define that term in the definitions section; therefore, Staff recommends the definition be deleted.

Staff Exception No. 4: "Residential Customer"

Staff incorporated a definition of "Residential Customer" because the CUB/AG proposed a definition in its Initial Comments that appeared to be based on a similar definition found in the Alternative Gas Supplier Law contained in Section 19-105 of the PUA. Staff stated in its Reply Comments that:

> Residential Customer is not defined in the PUA and Staff saw no compelling need to create a definition for this Code Part. However, Staff is not opposed to referencing the definition of Residential Customer found in Code Part 280.

In Staff's opinion, it is important for the definition of "Residential Customer" to follow the language contained in 83 Ill. Admin. Code 280. Part 412 will apply to RESs and electric utilities. If RESs and electric utilities follow the rules contained in Part 412, consumers will never have reason to read this rule. Additionally, CUB/AG incorporate

Staff's proposed definition into Attachment A of their Initial Brief, stating that: "In Staff's Proposed Rule, a definition of "Residential Customer" was included to which CUB/AG have no objection." (CUB/AG Initial Brief, at 6.)

Staff does acknowledge that 83 Ill. Admin. Code 280 defines "Residential Service" and not "Residential Customer" and therefore Staff proposes this modified definition.

> "Residential Customer" means a ~~retail~~ customer ~~of a retail electric utility that~~ receive~~s~~ing ~~(i) retail electric utility~~ residential service as defined in 83 Ill. Admin. Code 280. ~~for household~~ purposes ~~distributed to a dwelling which receives delivery services of a utility under a residential rate or (ii) retail electric utility service for household purposes distributed to a dwelling unit or units that is billed under a residential rate and is registered by a separate meter for each dwelling unit of 15,000 kWh or less~~.

B. Section 412.20 Waiver

Staff Exception No. 5: Waiver

From the context of the Proposed Order and particularly the language in the proposed rule, Staff will presume that the Proposed Order found Staff's proposal "overly restrictive." Essentially, it appears to Staff that the Proposed Order assumes that adding the "just and reasonable" standard obviates the need for Staff's proposed subparts (1), (2), and (3).

Upon reviewing the record, the undersigned understands that this issue was not as clearly framed as it should have been. The fundamental point is that whatever version of the rule the Commission ultimately adopts, all of the provisions of the rule will have been found "just and reasonable." Thus, if the waiver standard is just and reasonable, the Commission would ultimately end up with competing just and

reasonable findings. This is a fundamental reason why the waiver standard needs to be a higher standard. With this framework in mind, Staff addresses each of the subparts in its proposed waiver language in turn.

Subpart (1) provides that "the provision from which the waiver is granted is not statutorily mandated." As a matter of law, the Commission cannot grant a waiver to a provision of the PUA that is mandated by the Illinois General Assembly. As a creature of statute, the Commission has no general powers except those expressly conferred by the legislature. *Business and Professional People for the Public Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990). Moreover, the Illinois Supreme Court has long held that an administrative agency can neither limit nor extend the scope of its enabling legislation. *Carpetland U.S.A. v. Ill. Dept. Employment Security*, 201 Ill. 2d 351, 397, 776 N.E.2d 166, 192 (Ill. 2002) ("An administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity."). The Commission, consequently, *must* follow and implement the statute's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1st Dist., 1995). *See Interim Order on Remand (Phase I)*, Filing to Implement Tariff provisions of Section 13-801 of the Public Utilities Act, ICC Docket 01-0614 (April 20, 2005).

Staff, consequently, cannot see how subpart (1) could be too restrictive. At best, one could argue that the "just and reasonable" standard itself precludes the Commission from granting a waiver that is statutorily mandated. Staff does not argue with that proposition. However, this brings up the issue of competing just and

reasonable standards. The counter argument, of course, would be to focus on the phrase "under the circumstances." However, this phrase is vague and ambiguous to the extent as to render it meaningless. Also, even acknowledging that the last just and reasonable finding may be the operative one, it still makes sense to Staff to have a higher standard for one seeking relief or a waiver from an already found just and reasonable rule provision.

Subpart (2) provides that "no party will be injured by the granting of the waiver." This subpart is really the heart of the matter. Regarding the issue of Staff's language being overly-restrictive, Staff notes that after a utility or RES (any party with any obligation under the rule could seek a waiver) files a waiver petition, *if* an injured party intervened, such a party (even though the burden of proof would be on the petitioner) would still have to demonstrate injury by a preponderance of the evidence. Consequently, under Staff's proposed language the Commission would not be precluded from weighing the interests of all the parties involved.

Further, as Staff argued in its Initial Brief, eliminating this language undermines the rule itself. Part 412 is designed to protect consumers from fundamentally unfair business practices. Again, as noted above, whatever part of the rule, a utility or RES would seek relief from, that specific provision would have already been found "just and reasonable" by the Commission. ComEd's proposal ignores this important fact. ComEd's proposal subtly shifts the baseline from a provision of the rule to the waiver petition itself. In other words if the standard for a waiver is just and reasonable, then this fact would seem to undermine or diminish this rulemaking if at the end of the day a provision of the rule can be waived under the same standard it was originally found just

and reasonable. In Staff's view, ComEd's proposal goes too far in favor of waivers. Staff IB, at 15-16.

Subpart (3) provides that "the rule from which the waiver is granted would, as applied to the particular case, be unreasonable or unnecessarily burdensome." In effect, this brings into the rule the "just and reasonable" standard but with the additional protections of subparts (2) and (3). Staff's proposed rule is thus more balanced than the ComEd proposal, and as noted above, based upon other similar waiver provisions, the Commission and JCAR would appear to agree with Staff.

Staff, accordingly, recommends that the Commission adopt Staff's originally proposed Section 412.20 Waiver language.

See Att. B for Staff's replacement language for the Proposed Order.

Replacement language for Section 412.20

Section 412.20 Waiver

a) The Commission, on application or petition of a RES or electric utility, may grant a temporary or permanent waiver from this Part, or any applicable subsections contained in this Part, in individual cases where the Commission finds that ~~granting the request is just and reasonable under the circumstances.~~:

1) the provision from which the waiver is granted is not statutorily mandated;

2) no party will be injured by the granting of the waiver; and

3) the rule from which the waiver is granted would, as applied to the particular case, be unreasonable or unnecessarily burdensome.

b) The burden of proof in establishing a right to waiver shall be on the party seeking the waiver.

C. Section 412.30 Construction of this Part

Staff Exception No. 6: Construction of this Part

Section 412.30 appears to have been inadvertently omitted from the Proposed Rule (App. A). The Proposed Order concluded that:

> We agree that this rulemaking is the appropriate proceeding to address consumer protection issues such as right of rescission. We find that Part 412 should be the ultimate authority in matters of consumer protection those customers being served by RESs. As a result, the Commission rejects this language and will address any overlapping arguments with Section 412.210 in the pertinent section.

It appears that the phrase "this language" in the last sentence quoted above refers to Ameren's proposed language for Section 412.210. Staff, and other parties, pointed out that Ameren's proposed language in Section 412.210 conflicted with Staff's Proposed 412.30. The Proposed Order appears to agree with Staff and the other parties regarding Section 412.30. Further, the Proposed Rule rejected Ameren's proposed language regarding rescission in Section 412.210.

The Proposed Order agrees with Staff that this rulemaking is the appropriate proceeding to address consumer protections, and that Part 412 should be the ultimate authority. However the Proposed Rule does not reflect that conclusion because Section does not appear in the Proposed Rule. Since the conflicting language for Section 412.210 proposed by Ameren has been rejected by the Proposed Order, Staff recommends Section 412.30 read as follows:

> **Section 412.30 Construction of this Part**
> In the event of any conflict between this part and the requirements provided in electric utility tariffs on file with the Commission as of the effective date of this Part, this Part shall control.

D. Section 412.100 Application of Part B

Staff Exception No. 7 Application of Part B

The Proposed Rule reflects the language that Staff proposed in Reply Comments and in its Initial Brief. The Proposed Order, however, would lead one to understand that Staff's proposed language in Section 412.100 was rejected. Staff adopted this language after IIEC proposed language that would exempt certain RESs that do not market or sell service to retail customers from the requirements of Sections 412.170(a), (b), and (c) and 412.180. IIEC pointed out that some RESs, like its members, do not serve retail customers generally because they only serve their own load or the load of other corporate affiliates. Those RESs have limited certificates of authority from the Commission pursuant to Sections E, B, and C of 83 Ill. Adm. Code 451. Staff agreed with IIEC's proposal and included a slightly modified Section 412.100(b) in its Reply Comments and its Initial Brief. ICEA, however, tried to take this one step further and opined that RESs serving the larger, more sophisticated commercial and industrial customers should not be bound by the record keeping requirements of Section 412.180. ICEA offered a slight modification to subpart (b) of Section 412.100 to reflect this position. Staff does not agree with ICEA. Rather, Staff has consistently recommended that all RESs that do any marketing to retail customers are subject to Sections 412.170(a), (b), and (c) and 412.180.

See Staff replacement language in Att. B.

E. Section 412.110 Uniform Disclosure Statement

Staff Exception No. 8: Uniform Disclosure Statement

The Proposed Rule (App. A) omits Staff's proposed Section 412.110(j). As part of its Initial Brief, Staff proposed some modifications to the Uniform Disclosure Statement Section in order to provide more clarity regarding the proposed rescission process. One of the modifications tries to ensure that there is no ambiguity about possible early termination fees if the customer wishes to rescind the contract before the utility receives the enrollment request from the RES. It was always Staff's intent that customers should be able to rescind a contract before the RES submits the enrollment request to the utility and this addition to the rule makes this intent clear. Accordingly, Staff proposed to add the following as item (j) in Section 412.110:

> A statement that the customer may rescind the contract, by contacting the RES, before the RES submits the enrollment request to the electric utility;

The Proposed Order does not address this omission and it might simply be an oversight. Regardless, Staff recommends that the Commission add the above language to Section 412.110(j).

Staff Exception No. 9: Uniform Disclosure Statement

On page 13, the Proposed Order discusses Subsection 412.110(k), which is Subsection 412.110(j) in the Proposed Rule (App. A). The Proposed Order states that it "agrees with RESA's proposal." (Proposed Order at 13.) The Proposed Rule, however, contains language that mainly adopts Staff's proposed language, albeit with some modifications. As explained in Staff's Initial Brief, given the utilities expressed difficulty and/or costliness of monitoring and tracking small commercial customers with annual usage below 15,000 kWh in real-time (ComEd Surreply Comments at 2-3; AIU Surreply

Comments at 3), Staff foresees confusion and frustration among commercial customers if they contact the utility to rescind a contract with a RES. Staff IB, at 25. Because the electric utility will not inform the customer whether or not the customer is a small commercial customer, the customer will not know whether there are early termination fees associated with the cancellation of the contract. For this reason, Staff recommends that the rule specify that only residential customers may contact the electric utility to rescind a contract and pending enrollment request. Small commercial customers should contact the RES to rescind a contract and pending enrollment request. Consequently, Staff continues to recommend the following language for Section 412.110(k), which is Section 412.110(j) of the Proposed Rule:

> ~~j~~k) A statement that the customer may rescind the contract and ~~or cancel~~ the pending enrollment within ten calendar days after the electric utility processes the enrollment request by contacting ~~either~~ the RES, and that residential customers may rescind the contract and the pending enrollment by contacting either the RES or the electric utility and provide both phone numbers;

Staff Exception No. 10: Uniform Disclosure Statement

On page 12, the Proposed Order starts the discussion about the Uniform Disclosure Statement ("UDS") with the parties' positions regarding Staff's proposed Subsection that addresses the additional disclosures in the case of fixed monthly charges. The Proposed Order then goes on to address other items of the UDS before returning to the topic of proposed Subsection (0) (which is Staff's proposed Subsection (p)) on page 15. Staff recommends that the position of the parties and the Commission's Analysis & Conclusion be placed together in the Proposed Order.

Reviewing the Proposed Order and the Proposed Rule (App. A), Staff assumes that the Proposed Order declined to forbid RESs from offering fixed monthly charges. Along with several other parties, Staff argued that such an outright restriction would indeed be an extreme remedy to address potential customer confusion. In fact, as noted by Staff in its Initial Brief (at 19-20), even CUB/AG appears to be no longer advocating an outright ban on so-called fixed bill offers. CUB/AG stated that "the RES could, however, use average usage data to estimate the per kWh price in order to provide some context for consumers to compare a fixed bill offer to the price they are paying their regulated utility for power and energy supply." (CUB/AG Surreply Comments at 4.)

The Proposed Order concluded that "the RES is required to disclose their fixed-price services on a kilowatt per hour basis to best serve the customer." (Proposed Order at 15.) The Proposed Rule (App. A), however, strikes Staff's proposed language and adds several new subsections to Section 412.110(o). Rather than implementing the conclusion found on page 15 of the Proposed Order, the new language for Section 412.110(o) adds different types of calculations that even involve delivery service charges. This appears to be the result of adopting most of RESA's language regarding a different "Uniform Disclosure Label," which is discussed on pages 17 and 18 of the Proposed Order. Staff recommends that that discussion be combined with the discussion of Section 412.110(o). Regardless, Staff does not see a benefit to further complicating the price disclosure by going beyond Staff's recommendation that the RES offering a fixed bill service clearly inform the customer that the fixed monthly charge is for supply charges only and that it does not include delivery service charges and

applicable taxes. More importantly, adding the volumetric delivery service charges to the supply charges and leaving out the fixed monthly delivery service charges will likely lead to much greater customer confusion than simply comparing the utility's supply charges to the RES's supply charges. CUB/AG appear to agree with this sentiment. (CUB/AG Surreply Comments, at 4.) Nowhere else in the Proposed Rule does it require the RES to estimate delivery service charges for any individual customer and Staff sees no benefit in doing so. As the Commission is aware, the delivery service charges are the same for the customer, regardless of the customer's choice of electric supply from either the utility or a RES.

However, while Staff strongly recommends against adopting the new proposed language for Section 412.110(o), Staff is not opposed to using the usage levels of 500, 1,000, and 1,500 monthly kWh as a basis for estimating the per kWh price in order to, in CUB/AG's words, "provide some context for consumers to compare a fixed bill offer to the price they are paying their regulated utility for power and energy supply." Doing so would reconcile CUB/AG's proposed language with the concept of using an estimated price-per-kilowatt hour. Thus, in order to find additional common ground among the parties' positions on this issue, Staff proposes the following the addition to Section 412.110(o), which is Staff's proposed Subsection 412.110(p):

> p) A price-per-kilowatt hour (kWh) for the power and energy service. If a product is being offered at a fixed monthly charge that does not change with the customer's usage and the fixed monthly charge does not include delivery service charges, the RES must provide a statement to the customer that the fixed monthly charge is for supply charges only and that it does not include delivery service charges and applicable taxes; therefore, the fixed monthly charge is not the total monthly amount for electric service. For any product that includes a fixed monthly charge that does not change with the customer's usage, the RES must provide an

estimated price-per-kilowatt hour for the power and energy service using sample monthly usage levels of 500, 1,000 and 1,500 kWh.

In addition, the Proposed Rule adds a new Subsection 412.110(p), which contains the following language: "p) The amount of the early termination fee, if any."

However, this requirement is already contained in Subsection 412.110(f) in both Staff's proposed rule as well as the Proposed Rule (App. A). Therefore, Staff recommends striking this redundant language.

F. Section 412.120 Door-to-Door Solicitation

Staff Exception No. 11: Door-to-Door Solicitation

The Proposed Rule (App. A) of the Proposed Order adds a new item (a) to this section which states:

A RES agent shall affirmatively represent that it is not affiliated with electric utility, government bodies, or consumer groups.

Staff's proposed rule contains similar language in Section 412.110(K) requiring disclosure of this information as part of the Uniform Disclosure Statement. Staff is not opposed to including this requirement in this section as well, but would recommend using the same language as found in Section 412.100(K) to be consistent.

a) A RES ~~and all of its sales~~ agent~~s~~ shall state ~~affirmatively represent~~ that it is an independent seller of power and energy service certified by the Illinois Commerce Commission, and that the agent is not representing or acting on behalf of the ~~affiliated with~~ electric utility, governmental bodies, or consumer groups.

Section 412.120 in the Proposed Rule includes three paragraph (d)'s. The third paragraph (d) in Section 412.120 of the Proposed Rule provides:

If a customer's enrollment is authorized by the customer signing a written authorization, the agent shall require the customer to initial the written Uniform Disclosure Statement, a copy of which is to be left with the

customer at the conclusion of the visit. The minimum list of items to be included in the Uniform Disclosure Statement is contained in Section 412.110.

This language appears to be language from Staff's initial proposed rule. However, Staff proposed revisions to this language in its Reply Comments. Staff accepted RESA's recommendation to strike the phrase: "If a customer's enrollment is authorized by the customer signing a Letter of Agency." Additionally, in its Reply Comments Staff made three other revisions to this paragraph. Staff proposed the following for Section 412.120(f):

> fe) ~~If a customer's enrollment is authorized by the customer signing a Letter of Agency written authorization, t~~The RES ~~sales~~ agent shall require the customer to initial the RES agent's copy of the ~~written~~ Uniform Disclosure Statement.~~,~~ ~~a~~ A copy of ~~which~~ the Uniform Disclosure Statement is to be left with the customer at the conclusion of the sales visit. The minimum list of items to be included in the Uniform Disclosure Statement is contained in Section 412.110.

Additionally, Section 412.120 contains two sub paragraph (e)'s. Also, based on RESA's recommendation, Staff removed the phrase "that a copy of the Uniform Disclosure Statement was left with the customer, and." Staff recommends sub-paragraph (g) provide the following:

> gf) If a customer's enrollment is authorized by third-party verification during door-to-door solicitation, the third party verification shall require the customer to verbally acknowledge ~~that a copy of the Uniform Disclosure Statement was left with the customer, an~~d that he or she understands items (d) through (p) of the Uniform Disclosure Statement.

The Proposed Rule modifies its new paragraph (g) to only require a specific RES agent to refrain from any further marketing to that customer. However, Staff's proposed rule requires that the RES as an entity refrain from any further marketing to that customer. In other words, it is Staff's intention that the RES and not just the individual

RES agent soliciting the customer in a door-to-door solicitation shall refrain from any further marketing to the customer upon the customer's request. Therefore, Staff recommends maintaining Staff's proposed language as follows:

> ih) Upon a customer's request, the RES ~~and its sales agents~~ shall refrain from any further marketing to that customer.

G. Section 412.130 Telemarketing

Staff Exception No. 12: Telemarketing

The Proposed Rule (App. A) strikes the word "applicable" in subparagraph (c) of Section 412.130. Staff recommends that the term "applicable" remain in subparagraph (c) as proposed by Staff. All items of the Uniform Disclosure Statement are not applicable in every circumstance. For instance, section 412.110(g) requires disclosure of a deposit requirement and the RES agent should only disclose the deposit requirement to the customer if it is applicable to that customer. Additionally 412.110(o) requires a disclosure if savings are guaranteed and the RES agent should only be required to disclose the guaranteed savings to the customer if savings are in fact guaranteed. Moreover, the Proposed Rule leaves the term "applicable" in Section 412.140(b), which is the comparable section within the Inbound Enrollment Call section. Section 412.130(c) should read as follows:

> c) A RES agent shall ensure that, during the sales presentation to the customer, items (d) through (~~n~~p) of the Uniform Disclosure Statement (Section 412.110(d) through (o) (~~n~~p)) are verbally disclosed to the customer. A RES agent may disclose the items in any order so long as all applicable items are explained to the customer during the sales presentation.

The Proposed Rule varies from Staff's proposed Section 412.130(d) contained in its Initial Briefs. The Proposed Rule includes the phrase "require the customer to

verbally acknowledge that he or she understands". However, Staff struck this phrase from its proposed rule in its Reply Comments. Staff replaced that phrase in its Reply Comments with "include the applicable items contained in Section 412.110(d) –(o). Staff's revisions in its Reply Comments were based on comments received from both ICEA and RESA proposing language to clarify that the third party verifier needs to affirm that the customer understand the pertinent information applicable to the product they are being offered as required in Section 412.110 rather than asking the customer if they understand items (d)–(o) of the Uniform Disclosure Statement. Thus, Section 412.130(d) should read as follows:

> d) If a RES agent engages in telemarketing and third party verification is used to authorize a customer's enrollment, the third party verification must ~~require the customer to verbally acknowledge that he or she understands~~ include the applicable items contained in Section 412.110 (d) ~~through~~ - (np) ~~of the Uniform Disclosure Statement in Section 412.110~~.

The Proposed Rule (App. A) revises Section 412.130(d) to require the RES to provide the Uniform Disclosure Statement to the customer within seven business days, whereas Staff had proposed three business days. Staff agrees with the Proposed Order when it states "The Commission does not believe it is reasonable to expect the customer will receive the Uniform Disclosure Statement and contract unless the materials are sent electronically." (Proposed Order, at 19-20.) Staff's proposed rule contains the same requirement in Section 412.140(c). In Section 412.140(c), however, the term "send" is used rather than "provided." For purposes of consistency, Staff proposes using the same terminology in both Sections of the rule. It is Staff's expectation that the RES shall send the Uniform Disclosure Statement to the customer

within 3 business days. We understand the RES has no control over the mail once it mails the Statement. Staff recommends Section 412.130(e) should read as follows:

> ef) The Uniform Disclosure Statement and ~~sales~~ contract must be ~~provided~~ sent to the customer within three ~~seven~~ business days after the electric utility's confirmation of an accepted enrollment.

H. Section 412.150 Direct Mail

Staff Exception No. 13 Direct Mail

The Proposed Rule (App. A) the term "Letter of Agency" in paragraph (b) and replaces it with "authorization." Additionally the term "authorize" is replaced by the word "confirm." The Letter of Agency is the instrument used to "authorize" a customer's enrollment per Section 2EE of the Consumer Fraud Act. Paragraph (b) includes the requirements if a written Letter of Agency is used to authorize a customer's enrollment when direct mail is the form of solicitation used. If the customer enrolls as a result of direct mail with a written Letter of Agency, the customer is "authorizing" the RES to enroll them. The RES does not use a Letter of Agency to "confirm" a switch but rather the Letter of Agency is the instrument that "authorizes" a switch per Section 2EE of the Consumer Fraud Act. Consequently, Staff recommends that Section 412.150(b) provide that:

> b) If a written Letter of Agency ~~authorization~~ is being used to authorize ~~confirm~~ a customer's enrollment, it shall contain a statement that the customer has read and understood the items contained in the Uniform Disclosure Statement in Section 412.110. The document containing the items of the Uniform Disclosure Statement must remain with the customer.

I. Section 412.160 Online Marketing

Staff Exception No. 14: Online Marketing

The Proposed Rule (App. A) modifies Section 412.160(d)(4) by omitting the term "toll-free" in reference to phone number, omitting "of the RES" in reference to the phone number, changing "rescind" to "cancel" and adding "pending enrollment or rescind" with regard to the contract. Staff recommends that a RES be required to have a toll-free phone number for customers to call the RES to rescind their contract. Staff, recommends that Section 412.160(d)(4) provide that:

> 4) An e-mail address and toll-free phone number of the RES where the customer can express a decision to rescind ~~cancel the~~ ~~pending enrollment or rescind~~ the contract.

J. Section 412.170 Training of RES Agents

Staff Exception No. 15: Training of RES Agents

Regarding, Section 412.170(d), although the Proposed Rule uses language from Staff's Initial Proposed Rule, Staff subsequently made three changes to its proposed language for Section 412.170(d) in its Reply Comments, based on comments received by the parties. These comments were non-controversial and, in Staff's view, improved the rule, so Staff adopted them. See Staff Reply Comments at 30. Consequently, Staff recommends that Section 412.170(d) read:

> d) A RES ~~agent~~ shall refrain from any direct marketing or soliciting of power and energy service to customers on the electric utility's Do Not Market List, which the electric utility shall make available to RESs at least monthly on the 15th calendar day of the month. If the 15th calendar day is a non-business day, the electric utility shall make the list available on the next business day following the 15th calendar day of that month. ~~The Do Not Market List maintained by the electric utility shall contain the customer's name, service address and phone numbers.~~ A RES shall use the most current version of the Do Not Market List available; however, in assessing compliance with this Section, 31 days will be afforded to an

RES to account for the time required by the RES to disseminate and process the list internally.

K. Section 412.180 Records Retention and Availability

Staff Exception No. 16: Records Retention and Availability

Regarding, Section 412.180(b) the language in the Proposed Rule appears tro adopt language from Staff's Initial Proposed Rule. However, Staff made three changes to Section 412.180(b) in its Reply Comments, based on comments received by the parties. See Appendix A of ComEd's Initial Comments. Consequently, in order to accommodate uncontroversial comments that were contained in Staff's proposed language, Staff recommends that Section 412.180(b) read:

> b) Throughout the duration of the contract, and for two years thereafter, the RES shall retain and, within seven business days after the customer's request, provide to the customer, a copy of the contract via e-mail, U.S. mail or facsimile. The RES ~~may~~ shall not charge a fee for the copies if a customer requests ~~more~~ less than ~~two~~ three copies in a 12-month period.

L. Section 412.190 Proposed Affiliate Name and Logo Use

Staff Exception No. 17: Affiliate Name and Logo Use

The Proposed Order and the Proposed Rule (App. A) adopted CUB/AG's proposed addition of a new Section 412.190 that would prohibit a RES from using the name and/or logo of an existing electric utility. The Proposed Order does not provide an explanation for the acceptance of this new section into Part 412. CUB/AG proposed the following language in a new section, entitled "Affiliate Name and Logo Use:

> An ARES shall not be permitted to market power and energy service to residential customers using a similar name or logo to that of an existing electric utility.

(CUB/AG Initial Comments, at 9; Att A, at 16.)

CUB/AG argued that they "observed that the use of affiliate names and logos in the natural gas retail market has caused very real confusion for consumers" and that it "creates an un-level playing field among suppliers." (*Id*., at 9.) Staff agrees with CUB/AG that any such deceptive practices should be prohibited. However, Staff finds the language proposed by CUB/AG to be problematic. Whether a RES used a "similar" name or logo is something that the Commission is ill-suited to determine as it could involve making determinations under the federal Lanham Act (15 USC § 1125(a)) for trademark infringement and other determinations that simply do not fall under the Commission's recognized expertise in enforcing the PUA. Also, it has been Staff's experience that JCAR frowns on the use of words like "similar" because it is inherently so ill-defined.

Moreover, Staff has already included language in the proposed rule that should address CUB/AG concerns, while also casting a broader net in an effort to protect governmental bodies like the Commission and the AG, as well as consumer groups like CUB. This language, which is modeled on language contained in Section 19-105 of the PUA (220 ILCS 5/19-105), regulating alternative gas suppliers, is found in Section 412.110(k), Uniform Disclosure Statement, and provides that:

> A statement that the RES is an independent seller of power and energy service, and that the sales agent is not representing or acting on behalf of the electric utility, governmental bodies, or consumer groups;

Also, Staff has included language prohibiting misrepresentations or deceptive marketing practices in Section 412.170(c), which provides that:

> A RES and its sales agents shall not utilize false, misleading, materially inaccurate, or otherwise deceptive language or materials in soliciting or providing services.

Finally, since the General Assembly has already authorized the Commission to make "misrepresentation" judgments regarding alternative gas suppliers in Section 19-105 of the PUA (220 ILCS 5/19-105), it is already within their sphere of recognized expertise to make the same determinations regarding alternative retail electric suppliers in enforcing Sections 412.110(k) and 412.170(c). (Staff Reply Comments, at 30.) For these reasons, Staff recommends the Commission reject CUB/AG's proposed Affiliate Name and Logo Use language in Appendix A's Section 412.190.

M. Section 412.230 Early Termination of Contract

Staff Exception No. 18: Early Termination of Contract

The Proposed Order and the Proposed Rule (App.A) both modify Section 412.230 significantly from Staff's Proposed Rule as submitted in its Initial Brief. The first change is the removal of the term "early termination" when describing the "fee" and the phrase "or the formula used to calculate the termination fee" both contained in the first sentence. The Proposed Order concludes that:

> Although the parties have alluded to a formula to calculate the early termination fee, no actual calculations were provided for the Commission to consider. Thus we find the early termination fee should be reasonable given the relative cost to the RES.

(Proposed Order, at 25.)

There are currently three suppliers with residential offers that have early termination fees of $10 per remaining month(s) in the contract. Staff considers $10 per remaining month(s) in the contract to be technically a formula. For this reason, Staff recommends the phrase "early termination fee or formula used to calculate the termination fee" remain in this section.

Additionally, there is a discrepancy between the Proposed Order and the Proposed Rule with regard to the early termination fee waiver. The Proposed Rule retains Staff's proposed waiver language but the Proposed Order states:

> We find that a once per 12-month early termination fee waiver is not reasonable under the circumstances. There are many other variables which would cause the amount billed to differ from the amount charged on the contract, some of which cannot be directly attributed to the RES. The Commission will not adopt language that allows the consumer to terminate their contract, at great expense to the remaining consumers in the form of higher costs.
>
> (Proposed Order, at 25.)

Staff proposed the once-per-12-month-period alternative to the waiver option suggested by RESA, in an attempt to strike a balance between consumer protections and financial risk to the RESs. Staff believes that this customer protection measure is important and necessary to further encourage a competitive electric supply market

In its Surreply Comments, ICEA supports Staff's proposed limitation regarding a customer's ability to cancel a contract without incurring early termination fees and ICEA proposed language that describes this limitation in more detail in the actual rule. In its Initial Brief, Staff noted that it did not object to this additional language. However, due to an inadvertent oversight on Staff's part, this additional language did not make it into the proposed rule attached to Staff's Initial Brief. Staff, accordingly, recommends that the following proposed language be adopted for Section 412.230:

> **Section 412.230 Early Termination of ~~Sales~~ Contract**
>
> Any contract between a RES and a customer that contains an early termination fee shall disclose the amount of the early termination fee~~.~~ or the formula used to calculate the termination fee. Any contract that contains an early termination fee shall provide the customer the opportunity to contact the RES to terminate the contract without any

termination fee or penalty within 10 business days after the date of the first bill issued to the customer for products or services provided by the RES ~~one time per 12-month period~~. A customer relying on this provision to avoid an early termination fee shall be precluded from relying upon this provision for 12 months following the date the customer terminated his or her sales contract. The contract shall disclose the opportunity and provide a toll-free phone number that the customer may call in order to terminate the contract. This requirement does not relieve the customer of obligations to pay for services rendered under the contract agreement until service is terminated.

N. Section 412.250 Assignment

Staff Exception No. 19: Assignment

In its Initial Brief, Staff proposed changing all references in Section 412.250(c) from "agreement" to "contract" and Staff made this change consistently throughout the rule. The Proposed Rule makes the same change in subparagraph (c) but the first reference to "agreement" in the first sentence is not changed, which appears to simply be an inadvertent oversight. Staff, consequently, recommends that Section 412.250(c) provide that:

c) The rates, terms and conditions of the ~~agreement~~ contract being assigned do not change during the remainder of the time period covered by the contract; provided however, the assigned contract may be modified during the term of the contract if the new RES and the retail customer mutually agree to the changes or revisions of the contract ~~agreement~~ after assignment of the contract;

O. Section 412.300 Application of Subpart D

Staff Exception No. 20: Application of Subpart D

The Proposed Rule omits certain language Staff proposed in its Reply Comments. The Proposed Order, however, does not explain or address this omission. Whether it is simply an oversight or not, Staff recommends that Section 412.300 provide that:

Section 412.300 Application of Subpart D

The provisions of this Subpart shall only apply to RESs serving or seeking to serve residential or small commercial customers and only to the extent the RESs provide services to residential or small commercial customers. In addition, Sections 412.320 (c)(1)(B) and 412.320(c)(1)(E) shall apply to electric utilities.

P. Section 412.310 Required RES Information

Staff Exception No. 21: Required RES Information

The Proposed Order concludes that: "The Commission will adopt this Section as stated, with amendment to Section 412.310(a)." (Proposed Order, at 26.) Staff is unclear what amendment the Proposed Order is referencing here because the Proposed Rule does not indicate any amendments in Section 412.310(a).

In its Reply Comments, Staff proposed to add the phrase "Prior to the RES initiating marketing to residential and small commercial customer" to this Section. Staff did so in response to a proposal by ComEd. ComEd's Appendix A of its Initial Comments proposed adding a new subparagraph (n) to Section 412.110. Specifically, ComEd proposed adding that "the Commission has been informed that the RES is seeking to enroll customers." In Reply Comments, Staff noted that it does not believe this disclosure requirement would provide any benefit to a consumer. However, disclosure of this information to Commission Staff is certainly expected and Staff does not object to making this notification a requirement in this rule. Staff, consequently, recommends that the Proposed Rule include this additional language.

a) Prior to the RES initiating marketing to residential and small commercial customers, ~~T~~the RES shall provide the following to the Commission's Consumer Services Division (CSD):

Additionally, the Proposed Rule (App. A) strikes Section 412.310(c). The Proposed Order includes a discussion about CUB/AG's proposed *"force majeure"* language for the Uniform Disclosure Statement in Section 412.110(p). There is however, no discussion about Staff's proposed addition of the "*force majeure*" language within this Section 412.310, which would require the RES to disclose to the Commission's Consumer Services Division prior to initiating marking to residential and small commercial customers if the RES has declared *force majeure* within the past ten years.

In its Reply Comments, Staff agreed with CUB/AG to the extent that the Commission may benefit from this information provided by RESs, and recommended inserting this revised language in Section 412.310. (Staff Reply Comments, Pg. 22.) Staff, accordingly, recommends that Section 412.31(c) provide that:

> c) If the RES has declared *force majeure* within the past ten years on any contracts to deliver power and energy services, the RES shall provide notice to the Commission Staff prior to marketing to residential and small commercial customers.

Q. Section 412.320 Dispute Resolution

Staff Exception No. 22: Dispute Resolution

The Proposed Rule (App A) of the Proposed Order rejects certain changes in Section 412.320(b) proposed by Staff in its Reply Comments, which were based on comments received from ComEd. See Appendix A of ComEd's Initial Comments. The language contained in the Proposed Rule appears to be the same as that contained in Staff's initial draft rule, which would not include ComEd's non-controversial suggestions. Thus, Staff recommends that Section 412.320(b) accommodate these suggestions and provide:

b) A customer or applicant for power and energy service may submit ~~to an RES~~ a complaint by U.S. mail, facsimile transmission, by e-mail or telephone to a RES. The RES shall promptly investigate and advise the complainant of the results within 14 calendar days. If the RES ~~does not~~ responds to the customer's complaint ~~in writing~~ verbally, the RES shall inform the customer of the ability to request and obtain the RES's response in writing ~~upon request~~. A customer who is dissatisfied with the RES's response shall be informed of the right to file a complaint with the Commission and the Office of the Illinois Attorney General.

With respect to Section 412.320(c), the Proposed Order states "the Commission will adopt this Section with the proposed revision to Section 412.320(c)(3)." (Proposed Order, at 27.) However, the Proposed Rule also strikes Staff's proposed language in Sections 412.320(c)(1)(B) and 412.320(c)(1)(E). The Proposed Rule strikes the following language from Section 412.320 (c)(1)(B):

> In the case of the electric utility purchasing the RES's receivables or utility consolidated billing, the RES shall notify the electric utility of any informal complaint received and the electric utility shall follow the procedures outlined in its billing services agreement with the RES to withhold collection activity on disputed RES charges on the customer's bill.

The Proposed Order states "The Commission will not require the utility to respond to complaints filed against the RES…" (Proposed Order, at 27.) The Order goes on to state

> We find the utility is not the best resource for investigating and resolving the consumer's complaint. That responsibility ultimately lies with the RES, since it is best equipped to respond to the consumer.
>
> (Proposed Order, at 27.)

Staff agrees with the Proposed Order that the utility is not the best resource for investigating and resolving the consumer's complaint as that responsibility lies with the RES. However, this language as proposed by Staff does not require the utility to respond to complaints filed against the RES. The purpose of this language is to

address disputed charges in the case of utility consolidated billing and the purchase of receivables.

Dominion was the only party that opposed the language contained in Section 412.320(c)(1)(B), arguing that all complaints should be directed to the utility as opposed to the RES. Staff opposed Dominion's modification to this Section as Staff failed to see the logic in directing a RES customer to contact the electric utility with complaints, especially complaints involving the RES's charges. It would almost amount to releasing RESs of their obligation to their customers and instead place the utility in charge of the RES's customers. Staff believes directing customers to contact RESs, in the context of this provision, is the only sensible approach because the electric utility, while billing for the RES, is not able to answer customer questions about the RES electric supply charges.

Dominion's contention that "the utility does not want to be contacted by the RES because the RES is usually an interested party" is absurd in light of the fact that, at the same time, Dominion wants to direct the customer with a complaint to the electric utility and that customer is certainly "an interested party." Staff has difficulty following Dominion's inconsistent arguments and it appears to Staff that Dominion erroneously assumes that the electric utility is the arbiter of disputes between the RES and its customers. (Staff's Verified Reply Comments, at 49-50.)

Staff's proposed language is necessary to ensure that customers who choose to purchase their electricity from a RES using utility consolidated billing or purchase of receivables are afforded the same protections as all other customers. The RES is the appropriate entity to address any billing or rate related complaint that could involve

disputed charges. However, if the utility purchases the RESs receivables and bills on behalf of the RES then the utility also has the ability to disconnect that customer's service for non-payment. This language as proposed by Staff is necessary because the utility will have no way of knowing about a disputed RES charge unless the RES or the Consumer Services Division notifies the utility.

The language Staff proposes in Sections 412.320(c)(1)(B) as well as (E) is patterned after the following language from Part 280.160(c):

> When a customer disputes a particular bill, a utility shall not discontinue service for nonpayment so long as the customer
> 1) pays the undisputed portion of the bill or an amount equal to last year's bill at the location for the same period normalized for weather, whichever is greater; and
> 2) pays all future periodic bills by the due date; and
> 3) enters into bona fide discussions with the utility to settle the dispute with dispatch.

The Proposed Rule also strikes similar language in Sections 412.320(c)(E)(i) and 412.320(c)(E)(ii). Staff recommends that the Commission retain Staff's proposed language. It is critical for this rule to specify the informal complaint process for RESs using utility consolidated billing or the purchase of receivables. Without this language in Sections 412.320(c)(1)(B) and (E), the Commission cannot guarantee customers of RESs using purchase of receivables or utility consolidated billing will have the same protections during the informal complaint process as customers buying electricity from the utility.

For these reasons, Staff recommends that Sections 412.320(c)(1)(B) and (E) provide that:

> B) The Commission's CSD may resolve a complaint via phone by completing a three-way call between ~~involving~~ the customer, the CSD staff and the RES. If no resolution is reached by phone and a dispute remains,

an informal complaint may be sent to the RES. In the case of the electric utility purchasing the RES's receivables or utility consolidated billing, the RES shall notify the electric utility of any informal complaint received and the electric utility shall follow the procedures outlined in its billing service agreement with the RES to withhold collection activity on disputed RES charges on the customer's bill.

E) While an informal complaint process is pending:

i) The RES (or the electric utility in the case of the electric utility having purchased the RES's receivables) shall not initiate collection activities for any disputed portion of the bill until the Commission Staff has taken final action on the complaint; and

ii) A customer shall be obligated to pay any undisputed portion of the bill and the RES (or the electric utility in the case of the electric utility purchasing the RES's receivables or the utility presenting the RES's charges on a consolidated bill) may pursue collection activity for nonpayment of the undisputed portion after appropriate notice.

Q. Part 453 Internet Enrollment Rules

Staff Exception No. 23 Requirements for an Electronic LOA

The Proposed Order states "Since there is no objection from the parties regarding the proposed language, the Commission will adopt this Section as amended." (Proposed Order, at 28.) In addition to adopting Staff's proposal to delete 453.40(a)(4), the Proposed Order replaces the term "LOA" with the term "contract" in Section 453.40. Staff took exception in its BOE to a similar change in Part 412 where the Proposed Order replaced of the term "LOA" with the term "written authorization." As Staff noted in Staff Exception No. 2, the term "LOA" is the document described in Section 2EE of the Consumer Fraud Act as a "letter of agency." The sole purpose for the letter of agency as described in Section 2EE is to authorize an electric service provider change, which may be either written or *electronically* signed. Additionally, LOA is a term defined in

Section 453.10 and referenced in both Sections 453.20 and 453.30. The Proposed Order does not change references to “LOA” in Sections 453.10, 453.20 and 453.30. For these reasons, Staff recommends that the term “LOA” not be replaced with the term “contract” in Section 453.40 of the Proposed Rule. Also, as a minor edit, JCAR directed Staff to insert the specific date of July 1, 2003, rather than Staff’s original recommendation of “the effective date of this Part.” Consequently, Section 453.40 should read as follows:

Section 453.40 Additional Requirements for an Electronic ~~Contract~~ LOA

a) In addition to the information and structure set out for a ~~contract~~ LOA in 815 ILCS 505/2EE, by virtue of being in electronic form, an electronic ~~contract~~ LOA must provide the following additional information:

1) The means by which any future correspondence between the customer and RES will be sent;

2) Whether the customer has the option to receive correspondence via the United States Postal Service or electronic means; and

3) That the customer may opt to receive a written copy of the contract.

b) In addition to the procedures set out for a RES in Section 2EE of the Consumer Fraud and Deceptive Business Practices Act [815 ILCS 505/2EE], the RES also must abide by the following procedures when utilizing ~~an~~ electronic ~~contract~~ LOAs:

1) Ensure that the customer provides all information necessary to complete the electronic ~~contract~~ LOA through a securely encrypted input procedure that meets or exceeds current industry practices;

2) Ensure that the customer indicates by a separate affirmative act that it has the authority to execute the electronic ~~contract~~ LOA;

3) Ensure that the customer indicates by a separate affirmative act that it understands and assents to the ~~contract~~ LOA;

4) Include a version number in the body of the electronic ~~contract~~ LOA in order to permit verification of the particular ~~contract~~ LOA to which the customer assents;

5) Prompt the customer to print or save a copy of the electronic ~~contract~~ LOA;

6) Immediately send a message to the customer's registered e-mail account acknowledging receipt of the electronic ~~contract~~ LOA;

7) Retain the electronic ~~contract~~ LOA for a period of at least five years after execution; and

8) Provide a written and/or electronic copy of the ~~contract~~ LOA to the Com-mission or its Staff, the customer, or the customer's incumbent RES upon request.

c) In the event of any conflict between this Section and the requirements for RESs and ~~contracts~~ LOAs provided in electric utility tariffs on file with the Commission as of ~~the effective date of this Part~~ July 1, 2003, this Section shall control.

(Source: Amended at __ Ill. Reg. _____, effective _____)

II. CONCLUSION

WHEREFORE, for all of the above-articulated reasons, Staff respectfully requests that the Proposed Order and the Proposed Rule be changed consistent with the positions above.

Respectfully submitted,

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